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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 32

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Petitioner,

vs.

SUPERMARKET EQUIPMENT CORPORATION,
Substituted for EVELYN B. BRADLEY and JOE WEINGARTEN,
Respondent.

MOTION AND PETITION FOR REHEARING

TOWNSEND F. BEAMAN,
Attorney for Respondent.
Business Address:
Reynolds Building,
Jackson, Michigan.

LLOYD W. PATCH,
Of Counsel.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR RE-HEARING

Respondent respectfully moves for leave to file the annexed petition for rehearing by this Court of its decision of December 4, 1950, reversing the judgment of the Court below. Rehearing is sought on the ground that the Court has misinterpreted the Finding of Fact by the lower court and it has failed to appreciate the structural and functional differences that exist between a pool ball rack and the open ended, bottomless, self-unloading rack, as defined by claim 6 of the Turnham patent, as pointed out more fully in the annexed petition.

TOWNSEND F. BEAMAN,
Counsel for Respondent.

Date: December 16, 1950.

PETITION FOR REHEARING

Respondent prays that this Court grant rehearing of its decision of December 4, 1950, reversing the Judgment of the Court below in the above entitled matter.

REASONS FOR GRANTING REHEARING

I. This Court, in said decision, has given a precise and comprehensive definition of the test to be applied in combination patents of a mechanical nature in order to find invention. The need for such a definition is obvious. Moreover, it will be immediately applied by patent owners, solicitors of patents and those charged with the granting and enforcement of patents, to evaluate and judge patent rights.

II. The subject matter of the Turnham patent has become generally known to the public throughout a large portion of the United States. Its physical structure is known as is its operation and its function. To millions of food buyers the device was accepted as a useful improvement which reduced their waiting time at the checkout counter. This multitude of laymen would fail to observe any alleged structural or functional similarity between a conventional pool ball rack and the open-ended, bottomless, self unloading rack into which they have become accustomed to unload their groceries while awaiting their turn at the cashier's counter.

III. There is nothing in the record before the District Court, or its Findings of Fact, disclosing the structure and function of the rack of the Turnham Patent to be an old element. This Court's holding that all of the elements of the combination were old apparently stems from a misinterpretation of the District Court's observation in the preamble of its Findings of Fact No. 15 that "Three-sided bottomless racks or trays had been used in racking pool balls prior to the Turnham invention".

IV. Although it is a fact that counters in use prior to the Turnham development were not equipped with "extensions" at a point where the groceries could be un-

loaded out of the reach of the clerk, this Court has misconstrued that portion of the District Court's Findings of Fact No. 15 which reads as follows:

> "15. Claims 4, 5 and 6 of the patent in suit define a new combination of elements brought together for the first time by Turnham to provide an improved check-out counter.
>
> "Three-sided bottomless racks or trays had been used in racking pool balls prior to the Turnham invention. Also checking out counters were known. Moreover, guide rails for trays had been used in self-serve restaurants.
>
> "However, the conception of a counter with an extension to receive a bottomless self-unloading tray with which to push the contents of the tray in front of the cashier was a decidedly novel feature and constitutes a new and useful combination."

It is submitted that the "novel feature", referred to in the quotation above, designated the combination of the extension and the rack of specific character and not the extension alone, as interpreted by the Court in its opinion.

V. The Court failed to give weight to Findings of Fact No. 17 in concluding the elements of the combination were all old.

VI. The new combination most specifically covered by claim 6 of the Turnham patent does, in fact, meet the test of a patentable combination as defined by the Court in its decision of December 4, 1950. An "extension" to a counter of the type in use prior to the Turnham development would not increase the efficiency of the checking-out operation. Nor would an open ended bottomless self-unloading rack placed upon a counter of the construction in use prior to the Turnham development increase the efficiency of the checking-out operation. However, when these two elements, both new, were put together and located ahead of the usual cashier station "unusual and surprising consequences" resulted from the "unification of the elements" in the form of an increased efficiency in excess of thirty per cent.

CONCLUSION

During the past decade this Court has, with justification, directed more attention to the correction of patent abuses and definition of invention than during any similar period in the past. Without exception, every decision during the period has been a land mark in our patent system and the recognized incentive it has provided for advancement. It is respectfully urged that the misinterpretation of the facts as set forth above, may reasonably result in the definition of a patentable combination set forth in the decision of December 4, 1950, being misunderstood and misconstrued. It is for this reason that rehearing should be granted.

Respectfully submitted,

TOWNSEND F. BEAMAN,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

TOWNSEND F. BEAMAN,
Counsel for Respondent